

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC94516**

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**WES SHOEMYER, *et al*,**

**Contestants,**

**v.**

**MISSOURI SECRETARY OF STATE JASON KANDER, et al.**

**Contestee.**

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**Original Proceeding: Election Contest**

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**BRIEF OF INTERVENORS**

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### **JURISDICTIONAL STATEMENT**

This Court has original jurisdiction over this election contest pursuant to Section 115.555, RSMo...

## **STATEMENT OF FACTS**

House Joint Resolution 11 (HJR 11), proposing a constitutional amendment regarding the right to farm, was truly agreed to and finally passed in the 2013 legislative session.(Missouri Journal of the House, 97-68, 1<sup>st</sup> Sess., at 2445 (2013)); On May 22, 2013 HJR 11 was signed by the Speaker of the House and delivered to the Secretary of State by the Chief Clerk of the House (Missouri Journal of the House, 97-72, 1<sup>st</sup> Sess., at 33309 (2013)). Defendant Kander certified the Official Ballot Title for HJR 11, using the ballot title drafted and approved by the General Assembly, on June 24, 2013. On May 23, 2014, the Governor issued a proclamation setting the vote on HJR 11 for the August 5, 2014 election. On August 5, 2014, Constitutional Amendment No. 1 was submitted to and approved by Missouri voters. Secretary of State Kander certified the results of the election on August 25, 2014. (Defendant Kander's Aff. Defenses. ¶ 5) Pursuant to Article XII, Section 2(b), the amendment became effective on September 4, 2014 and no stay of the effective date was requested or granted. Plaintiffs did not file their Petition for an Election Contest until October 14, 2014. On August 26, 2014 Plaintiff Shoemyer petitioned for a recount of the votes and on September 15, 2014 Defendant Kander again certified the results of the August 5, 2014 election showing that the voters had approved Constitutional Amendment 1. (Plaintiffs' Pet. Ex. B) .

**POINTS RELIED ON**

**I.**

**THIS COURT SHOULD NOT INVALIDATE AMENDMENT 1 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE PLAINTIFFS' PETITION IS OUT OF TIME AND AS SUCH PLAINTIFFS' CLAIMS ARE MOOT AND BARRED BY THE DOCTRINE OF LACHES IN THAT PURSUANT TO ARTICLE XII, SECTION 2(B), AMENDMENT 1 BECAME FINAL AND IN FORCE THIRTY DAYS AFTER THE ELECTION, ON SEPTEMBER 4, 2014, AND PLAINTIFFS' SUIT WAS NOT FILED PRIOR TO SUCH EFFECTIVE DATE.**

**II.**

**THIS COURT SHOULD NOT INVALIDATE AMENDMENT 1 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE THE IRREGULARITIES REFERRED TO IN SECTION 115.553.2 RSMo.. ARE IRREGULARITIES HAVING TO DO WITH THE CONDUCT OF THE ELECTION AND CHALLENGES TO BALLOT TITLES ARE TO BE BROUGHT UNDER SECTION 116.190 PROVIDING FOR CHALANGES TO BALLOT TITLE.**



**III.**

**THIS COURT SHOULD NOT INVALIDATE AMENDMENT 1 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE PLAINTIFFS FAILED TO MEET THEIR BURDEN OF PROOF IN AN ELECTION CONTEST IN THAT THEY FAILED TO PUT ON ANY EVIDENCE TO SHOW AN ELECTION IRREGULARITY OF SUCH CONSEQUENCE AS TO CALL THE VALIDITY OF THE ELECTION INTO QUESTION.**

**IV**

**THIS COURT SHOULD NOT INVALIDATE AMENDMENT 1 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE THE BALLOT TITLE OF AMENDMENT 1 IS NOT INSUFFICIENT OR UNFAIR, MUCH LESS FALSE OR FRAUDULENT.**

## **SUMMARY OF THE ARGUMENT**

Plaintiffs' petition seeks a cause of action that is not available as a post-election action. Plaintiffs' petition relies on Section 115.553 RSMo.. that became effective in 1978 (HB 101, 1977). In 1980 procedures for challenging a ballot title were adopted (SB 658,1980) ensuring that if a ballot title was insufficient or unfair it could be corrected before the election and it is well established that a statute adopted later in time supersedes those adopted earlier in time. *Colabianchi v. Colabianchi*, 646 S.W.2d 61 (Mo. 1983) (quoting *City of Flat River v. Mackley*, 212 S.W.2d 462 (MO. Ct. App. 1948))

Although two statutes relating to the same general subject matter should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy, nevertheless, to the extent that statutes are inconsistent, the later statute, which deals with the same subject matter in a more particular way, will prevail over an earlier statute of a more general nature, and the later statute will be regarded as an exception to or qualification of the earlier general statute.

Plaintiffs' Petition if available would be out of time. Plaintiffs' claims would be moot and barred by the doctrine of laches because, pursuant to Article XII, Section 2(b) of the Missouri Constitution, Amendment 1 became effective on September 4, 2014.

Plaintiffs unreasonably and inexplicably waited forty (40) days after the Amendment became effective and seventy (70) days after the results of the election were known to bring their claims. The doctrine of laches bars unreasonably tardy claims. *Rentschler v. Nixon*, 311 S.W.3d 783, 787 (Mo. banc 2010).

In addition, Plaintiffs' Petition should be dismissed because Plaintiffs provided absolutely no proof that the outcome of the election would be different based on the alleged irregularity (an unfair and insufficient ballot title). In order to grant Plaintiffs' requested relief, this court must find that there "were irregularities of sufficient magnitude to cast doubt on the validity of the initial election." Section 115.593, RSMo... To grant the requested relief, this court must be "firmly convinced" that irregularities affected the outcome of the election. *Gerrard v. Board of Election Commissioners*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995). Plaintiffs have failed to provide any proof that would cast doubt on a single vote, let alone proof that would cast doubt on the election outcome. Plaintiffs' utter failure to meet their burden of proof precludes this court from finding in their favor. Not even the Plaintiffs have alleged, let alone offered proof, that they, or any other voter, were in any way misled by any alleged irregularity.

Plaintiffs' Petition should be dismissed as the ballot title for Amendment 1, which was approved Missouri voters, was not false, fraudulent, insufficient or unfair. If allowed, this is a post-election challenge, and as such the standard is much higher than a pre-election challenge. *Knight v. Carnahan*, 282 S.W.3d 9, 16 (Mo. App. W.D. 2009) citing *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 12 (Mo. banc 1981). The test "is whether

the language fairly and impartially summarizes the purposes of the measure, so that the voters will not be deceived or misled.” *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999). In a post-election contest, the standard to overturn an election requires a much higher showing, e.g., falsity or fraudulence in the title, none of which are alleged by Plaintiffs. See, e.g., *Royster v. Rizzo*, 326 S.W.3d 104, 115 (Mo. App. W.D. 2010). Missouri courts have explained, “If charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions...there are many appropriate and adequate ways of writing the summary ballot language.” *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008). It is clear Plaintiffs might have desired one of the other nine (or more) acceptable versions of the summary statement, but this desire falls far short of the test for insufficiency or unfairness, much less falsity or fraudulence.

Finally, Defendant Kander and Intervenor Missouri Farmers Care raise the issue of this Court’s Jurisdiction and Defendant Kander raises the issue of whether the remedy of this Court setting a date for a new election would violate the separation of powers. While the General Assembly Intervenor believe that this Court does have Jurisdiction, if it is found that this Court does not have jurisdiction to originally hear a ballot title case as a post-election challenge, pursuant to Section 115.555 and 115.557 RSMo.. the entire election contest statute should as it relates to constitutional amendments should be found unconstitutional . In what we believe to be the unlikely event this Court reaches the remedy stage of this case and finds that this court cannot order a new election as provided by

Section 115.593 RSMo.. then this Court should refuse to sever the respective sections, . Section 1.140 RSMo.. provides that;

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid **unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent**

Finding that this Court does not have jurisdiction and that the General Assembly having not conferred jurisdiction on another court would allow Jurisdiction in all circuit courts, creating confusion such that the valid provisions are incomplete and are incapable of being executed in accordance with the legislative intent. Finding that this Court does not have the authority to call a new election would result in a measure that both houses of the General Assembly felt was so important as to propose to amend the Constitution of this State and having been approved by the voters of this State for it to then after the vote and after it became effective (Article XII Section 2(b)) for it to be nullified with no recourse.

It cannot be presumed the legislature would have enacted a procedure to contest an election without a remedy that would allow the people to again vote on the issue.

Plaintiffs' Petition should be dismissed for being out of time (or mootness or based on laches), for not meeting the burden of proof in an election contest case, and because Plaintiffs' claims fail on the merits.

## **ARGUMENT**

### **Introduction**

This court should not invalidate Constitutional Amendment 1, after it was approved by voters because: (1) Plaintiffs unreasonably delayed in bringing their claims and as such their claims are moot and barred by the doctrine of laches; (2) an election challenge is not the proper cause of action to challenge a ballot title; ( 3) Plaintiffs failed to meet their burden of proof required in an election contest; (4) the ballot title for Amendment 1 sufficiently summarized the main points of amendment in terms that were not unfair or insufficient, much less the requisite standard of falsity or fraudulence; and (5) if this Court finds that it does not have jurisdiction or that the remedy of calling a new election as provided in Section 115.593 RSMo.. is not available because they are unconstitutional the rest of the provisions relating to election contests should not be severable.

### **Standard of Review**

**(Applicable to Points I, III and IV)**

Plaintiffs have asked this court to “invalidate” the election results of August 5, 2014, for Amendment 1. With this request, Plaintiffs are asking this court to “invalidate” the votes of more than 499,963 Missourians who voted “yes” on August 5, 2014. A declaration that an election is invalid is a “drastic remedy because it amounts to disenfranchisement of the voters.” *State ex rel. Bonzon v. Weinstein*, 415 S.W.2d 357, 362 (Mo. App. 1974). The provisions of Chapter 115, RSMo., make clear that the standard of review for ordering a new election is unique. Not just any irregularity in an election will give rise to a declaration of a new election. See, e.g., *Royster v. Rizzo*, 326 S.W.3d 104, 115 (Mo. App. W.D. 2010) (“[T]he general rule is that an election will not be annulled in the absence of fraud, even if some technical provisions of the law are not strictly followed.”). Rather, this court must find that there “were irregularities of sufficient magnitude to cast doubt on the validity of the initial election.” See Section 115.593, RSMo... To invalidate or “set aside” election results, a court must be “firmly convinced” that irregularities affected the outcome of the election. *Gerrard v. Board of Election Commissioners*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995).

The burden of proof and persuasion is a hearsay burden which falls solely and exclusively on the party challenging the election. *Royster v. Rizzo*, 326 S.W.3d 104, n. 3 (Mo. App. W.D. 2010) ““While the burden placed upon the party contesting the election to ‘firmly convince’ the trial court that ‘irregularities affected the outcome of the election’ is a heavy burden, it is so because of the ‘drastic remedy’ that is sought in election cases.”



**I.**

**THIS COURT SHOULD NOT INVALIDATE AMENDMENT 1 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE PLAINTIFFS' PETITION IS OUT OF TIME AND AS SUCH PLAINTIFFS' CLAIMS ARE MOOT AND BARRED BY THE DOCTRINE OF LACHES IN THAT PURSUANT TO ARTICLE XII, SECTION 2(B), AMENDMENT 1 BECAME FINAL AND IN FORCE THIRTY DAYS AFTER THE ELECTION, ON SEPTEMBER 4, 2014, AND PLAINTIFFS' SUIT WAS NOT FILED PRIOR TO SUCH EFFECTIVE DATE.**

Plaintiffs' Petition is out of time (and Plaintiffs' claims are moot) because Amendment 1 has already taken effect. Article XII, Section 2(b) of the Missouri Constitution, provides, in part:

If a majority of the votes cast thereon is in favor of any amendment,  
the same shall take effect at the end of thirty days after the election.

The election occurred on August 5, 2014. On August 6, 2014, it was known that nearly 500,000 Missourians voted in favor of the amendment, and the amendment passed. Pursuant to Article XII, Section 2(b), the amendment became effective on September 4, 2014.

Plaintiffs sought a re-count on August 26, a recount was conducted and on September 15 Secretary Kander recertified the results, Plaintiffs waited until October 14,

2014 to file their Petition for an Election Contest challenging the Ballot Title. Plaintiffs waited seventy days after the election (and forty days after the amendment became effective) to bring their claims. Plaintiffs should have brought their election contest prior to the amendment becoming effective pursuant to the Missouri Constitution. It is the result of Plaintiffs' own unreasonable delay that the provision is already in full force and effect without their claims being heard and as a result, their claims are barred by laches.

*In re Estate of Thomson*, 246 S.W.2d 791 (Mo. 1952) establishes the test for applying the Doctrine of Latches "Mere delay alone does not constitute laches. It must be delay that works to the disadvantage and prejudice of the defendants and the defendants must have been injured thereby. (citing *Davies v. Keiser*, 297 Mo. 1, 246 S.W. 897; *Johnson v. Antry* (Mo. Sup.) 5 S.W. (2d) 405 ;)". Here the prejudice to the true defendants, the voters of Missouri, is immense; the delay would disenfranchise the voters of Missouri and deny them the opportunity to amend their Constitution. Had the Plaintiffs filed a Ballot Title challenge as provided in Section 116.190 RSMo., and if the challenge had been successful, it would have allowed the Court to rewrite the ballot title or refer it back to the second session of the Ninety-Seventh General Assembly to correct, but Plaintiffs chose to do nothing until after Amendment 1 was placed on the ballot voted on by the people, approved and became part of the Constitution. Then they choose to bring a ballot title challenge under the guise of an Election Contest. In *Rentschler v. Nixon*, 311 S.W.3d 783, 787 (Mo. banc 2010), the Plaintiff complained about a legislative enactment, outside the ten year window for bringing such claims. *Id.* Because the state failed to plead statute of limitations as an affirmative defense, the court could not make a

determination based on such limitation. *Id.* at n.3. Still, the court noted the doctrine of laches would preclude Plaintiff's claims:

Although the legal bar of the statute may not be raised procedurally, the doctrine of laches may still operate to bar such unreasonable tardy claims as is the case presently. " 'Laches' is neglect for unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." *Id.* at n.3.

Not bringing the Ballot Challenge for well over a year after certification when to have done so would have resulted in a far less drastic remedy is certainly unreasonable and Plaintiffs have given no explanation for the long delay.

In the current matter even if the Court does not apply the Doctrine of Latches, Plaintiffs had a thirty day window to bring their suit pursuant to Article XII, Section 2(b). Even after the results were certified on August 25, 2014, Plaintiffs still had a ten day window between certification and the date when the amendment became effective to bring their election contest or attempt to bring an injunction action seeking to prevent the amendment from becoming effective. They did not bring their claims within any of these available windows. Instead, Plaintiffs now seek to remove an existing, operative provision of the Missouri Constitution through an election challenge. Nothing in Article XII, Section 2(b) provides for the "invalidation" or removal of an existing constitutional provision. Plaintiffs have not offered any explanation for their unreasonable delay. To

the extent Plaintiffs claim they are not out of time under Section 115.557, RSMo., Article XII, and Section 2(b) supersedes the language in such statute.

Likewise, Plaintiffs cannot seek to invalidate an effective constitutional provision on the basis of a summary statement challenge. The provision is already in operation and being enforced. If there were any “irregularities of sufficient magnitude to cast doubt on the validity of the initial election” such irregularities must be addressed prior to the amendment going into effect. To allow such a challenge would be to render Section 116.190, RSMo. meaningless.

As a result of Plaintiffs’ decisions to delay filing their Petition until well after the Amendment became effective, their Petition is out of time and any relief is now barred. This Court should find that the Petition fails to state a claim and thus should be dismissed.

## **II.**

**THIS COURT SHOULD NOT INVALIDATE AMENDMENT 1 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE THE IRREGULARITIES REFERRED TO IN SECTION 115.553.2 RSMO. ARE IRREGULARITIES HAVING TO DO WITH THE CONDUCT OF THE ELECTION, CHALLENGES TO BALLOT TITLES ARE TO**

**BE BROUGHT UNDER SECTION 116.190 PROVIDING FOR  
CHALLENGES TO BALLOT TITLE.**

Missouri law does not allow for post-election Ballot Title Challenges. Post-election challenges as we know them today were created by HB 101, 1977 in Section 115.553 RSMo.. and became effective in 1978. Procedures for challenging a ballot title were adopted in SB 658, 1980 Section 116.190 ensuring that if a ballot title was insufficient or unfair it could be corrected before the election and it is well established that a statute adopted later in time supersedes those adopted earlier in time. *Colabianchi v. Colabianchi*, 646 S.W.2d 61 (Mo. 1983) (quoting *City of Flat River v. Mackley*, 212 S.W.2d 462 (MO. Ct. App. 1948))

Although two statutes relating to the same general subject matter should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy, nevertheless, to the extent that statutes are inconsistent, the later statute, which deals with the same subject matter in a more particular way, will prevail over an earlier statute of a more general nature, and the later statute will be regarded as an exception to or qualification of the earlier general statute.

Chapter 115 RSMo. deals with election contest and irregularities occurring in the voting process or tabulating the votes; disenfranchisement of eligible voters; allowing ineligible people to vote; opening polling places late; keeping polling places open after the hour they are to close. These are election irregularities that

Section 115.553 contemplates as post-election challenges. Chapter 116 RSMo. deals with how things are put on the ballot and in 116.190 RSMo. address pre-election Ballot Title Challenges. To hold that you can challenge the ballot title after the election, when the outcome is known, would make Section 116.190 RSMo. and it's time limitations (which were adopted later in time than 115.553) meaningless. Sections 115.553 and 116.190 can and should be "read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy" *id.* . Even if a Ballot Title Challenge could have been brought as an election Contest in the past, the adoption of Section 116.190 RSMo. should now "be regarded as an exception to or qualification of the earlier general statute" *id.*.

### III.

**THIS COURT SHOULD NOT INVALIDATE AMENDMENT 1 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE PLAINTIFFS FAILED TO MEET THEIR BURDEN OF PROOF IN AN ELECTION CONTEST IN THAT THEY FAILED TO PUT ON ANY EVIDENCE TO SHOW AN ELECTION IRREGULARITY OF SUCH CONSEQUENCE AS TO CALL THE VALIDITY OF THE ELECTION INTO QUESTION.**

Not just any irregularity in an election will give rise to a declaration of invalidity or new election. See, e.g., *Royster v. Rizzo*, 326 S.W.3d 104, 115 (Mo. App. W.D. 2010) ("[T]he general rule is that an election will not be annulled in the absence of fraud, even

if some technical provisions of the law are not strictly followed.). Rather, this court must find that there “were irregularities of sufficient magnitude to cast doubt on the validity of the initial election.” *See* Section 115.593, RSMo.. To invalidate or “set aside” election results, a court must be “firmly convinced” that irregularities affected the outcome of the election. *Gerrard v. Board of Election Commissioners*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995). That standard requires proof, in the form of evidence, to demonstrate that the outcome of the election would be different.

In *Gasconade R-III School District v. Williams*, 641 S.W.2d 444 (Mo. App. 1982), the court ordered a new election where there were irregularities in absentee voting in a school tax proposition election. The proposition passed by two votes. *Id.* In that case, plaintiffs put forth evidence of seventeen absentee ballots (fifteen “Yes” ballots, two “No” ballots), of which eleven were questioned for failure to fill in the required ballot envelope affidavit. *Id.* at 445. The court noted that Section 115.295.2, RSMo., requires rejection of an absentee ballot where the affidavit was not completed. With a two vote margin, plaintiffs’ evidence that eleven ballots were in question was enough for the court to order a new election. *Id.*

A new election was also ordered in *Barks v. Turnbeau*, 573 S.W.2d 677 (Mo. App. 1978), where a school tax levy passed by a margin of six votes. In that case, the Plaintiff was able to show that sixty-six absentee voters made no application in writing, were not compiled into a list (or marked received) by the election authority, the affidavits associated with such ballots did not conform to the statutory requirements, forty-eight voters failed to fill out the affidavit, two voters attempted to use the same affidavit, and

sixty-six voters did not return ballots by an authorized method. *Id.* at 680-681. The court concluded that these were irregularities “**of sufficient magnitude to cast doubt on the validity of the initial election.**” *Id.* at 682.

A new election was also ordered in *Marre v. Reed*, 775 S.W.2d 941 (Mo. banc 1989), where a candidate won by a margin of eleven votes. In that case, the Plaintiff alleged fourteen people were allowed to vote who were not qualified. *Id.* at 954. The Missouri Supreme Court examined the evidence proffered by the plaintiffs and found at least eleven voters should have been disqualified. *Id.* at 955.

In *Gerrard v. Board of Election Commissioners*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995), the trial court found that the facts pled did not state a cause of action. The Court of Appeals affirmed, explaining: “The facts asserted in the petition were not sufficient to demonstrate how the alleged violation **affected the outcome of the election**, and therefore, the petition did not state a cause of action.” *Id.* at 90. Noting that the “statute has been construed to require conduct sufficient to affect the outcome of the election” the court pointed out that the petition did not allege that the “vote would have been different.” *Id.*

Similarly, in *Royster v. Rizzo*, 326 S.W.3d 104, 110 (Mo. App. W.D. 2010), the only evidence before the court showed that only registered voters voted, that there was no misconduct or voter fraud, and that the Plaintiff lost by one vote. In denying the appeal, the court stated: “Royster has failed to make any showing that would demonstrate that among the votes cast, any specific vote was cast or failed to be cast by some specific wrongdoing.” *Id.* The court did provide helpful advice to those bringing election



contests: “[I]n a case such as this with a margin of victory of only one vote, had Royster presented evidence...that one specific non-registered voter was allowed to vote or one registered voter was denied the right to vote, we would be more persuaded that Royster had made the requisite showing [.]” *Id.*

As in *Gerrard and Royster*, Plaintiffs have failed to produce **any evidence** that would cast doubt on the validity of the election.

Plaintiffs could have offered the testimony of voters -- how they voted under initial ballot language and that they would have voted differently if the alleged insufficiencies in the ballot title were corrected. Plaintiffs could have conducted some type of polling based on various proposed ballot titles for this measure showing that ballot titles have the ability to influence the outcome of the election. Plaintiffs could have provided expert testimony by an election or polling expert to offer data about how the words used in the ballot itself affects election outcomes. We cannot know if any such evidence would be sufficient for this Court to determine that an alleged insufficient ballot title casts doubt on the election itself, because such evidence is not before this court. Indeed, no evidence about **any votes** is before this Court.

Even assuming *arguendo* that the ballot title was insufficient or unfair, and that such insufficiency or unfairness constituted an “election irregularity,” Plaintiffs have failed to meet their burden of proof showing that such alleged irregularity was of sufficient magnitude to cast doubt on the validity of the election. There is not one scintilla of evidence that any alleged irregularity affected the outcome of the election.

Plaintiffs' absolute failure to introduce **any** evidence of an actual irregularity dooms their petition. This Court should deny the relief requested and dismiss Plaintiffs' Petition accordingly.

#### **IV.**

**THIS COURT SHOULD NOT INVALIDATE AMENDMENT 1 TO THE MISSOURI CONSTITUTION, AS APPROVED BY VOTERS ON AUGUST 5, 2014, BECAUSE THE BALLOT TITLE OF AMENDMENT 1 IS NOT INSUFFICIENT OR UNFAIR, MUCH LESS FALSE OR FRAUDULENT.**

Plaintiffs have failed to properly present their contentions in this matter, as is addressed in Points I, II III. However, out of an abundance of caution, Intervenors herein address the claims on the merits, without waiving all of the defects set forth above. Even in addressing the merits, Plaintiffs' Petition fails to state a claim for relief.

Plaintiffs' Petition is titled "Election Contest," but the crux of Plaintiffs' Petition is a challenge to the summary statement portion of the official ballot title of Constitutional Amendment 1 passed by the General Assembly in Conference Committee Substitute for House Joint Resolution 11 (HJR 11). There is a significant question whether a ballot title can be challenged in a post-election case. In *Cole v. Carnahan*, 272 S.W.3d 392, 393-95 (Mo. App. W.D. 2008), the court rejected the Plaintiffs' request on the basis that Section 116.190, RSMo., "did not authorize remedies other than the certification of a corrected ballot title[.]" Judge Holliger, who wrote separately in *Cole*,

pointed out it was an “open question...whether a successful proposition at an election can be challenged post-election because of an improper ballot summary.” *Knight v. Carnahan*, 282 S.W.3d 9, 16 (Mo. App. W.D. 2009) (citing *Cole*, 272 S.W.3d at 396). Even if this court were to determine that a post-election challenge of a ballot title is permitted, the Court must seek to uphold the decision of the people. “[W]here the people have demonstrated their will through their vote; our duty is to seek to uphold that decision.” *Knight*, 282 S.W.3d at 16 (citing *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 12 (Mo. banc. 1981)).

### **The pre-election test**

The summary statement portion of an official ballot title cannot be set aside unless it is “insufficient” or “unfair.” Section 116.190, RSMo.. “[T]his Court considers that ‘insufficient means inadequate; especially lacking adequate power, capacity, or competence’ and ‘unfair means to be marked by injustice, partiality, or deception.’ ” *Brown v. Carnahan*, 370 S.W.3d 637, 653-54 (Mo. banc 2012) quoting *State ex rel. Humane Soc’y of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. W.D. 2010); “Thus, the words insufficient and unfair . . . mean to inadequately and with bias, prejudice, deception and/or favoritism state the consequences of the initiative.” *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006).

A “ballot title is sufficient and fair if it ‘makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal.’ ”

*Overfelt v. McCaskill*, 81 S.W.3d 732, 738 (Mo. App. W.D. 2002) (quoting *United Gamefowl Breeder Ass’n of Mo. v. Nixon*, 19 S.W. 3d 137, 140 (Mo. banc 2000)). The test “is whether the language fairly and impartially summarizes the purposes of the measure, so that the voters will not be deceived or misled.” *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999).

“[E]ven if the language proposed... is more specific, and even if that level of specificity might be preferable,” that does not establish that the existing title is unfair or insufficient. *Id.* Deference is given to the elected official responsible for preparing the summary statements (in this case, the General Assembly) to decide what details should be included.

“[W]hether the summary statement prepared by the [General Assembly] is the best language for describing the [initiative] is not the test.” *Bergman*, 988 S.W.2d at 92. Rather, “[t]he burden is on the opponents of the language to show that the language was insufficient and unfair.” *Id.*

### **The Post-Election Test**

After voters have approved a constitutional amendment, the test to overturn that election rises to a much higher standard. Sufficiency and fairness is not the standard but instead falsity and/or fraudulence must be proven. In *Royster*, the Western District held that showing fraud is a requirement to sustain an election contest. *Royster v. Rizzo*, 326 S.W.3d 104, 115 (Mo. App. W.D. 2010). This Court has also required fraud be shown in order to make use of any remedy that would “deprive the voters of their votes.” *Kasten v. Guth*, 433, 436 (Mo. 1965). In *Kasten*, this Court looked to a number of claims of

irregularities. In affirming the election, this Court stated:

While the irregularities referred to should not be encouraged, they were not sufficient to constitute fraud, and in the absence of fraud we will not deprive the voters of their votes.

*Id.* This is the standard upon which this election contest is to be judged.

### **The Summary Statement**

The summary statement which was prepared and approved by the General Assembly summarizes the provisions of Constitutional Amendment 1 as follows:

Shall the Missouri Constitution be amended to ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed?

### **Deference should be given to the General Assembly**

Finally, the General Assembly is required to submit a fair and sufficient ballot title. Section 116.155, RSMo., provides, in part:

The General Assembly may include the official summary statement and a fiscal note summary...

2. The title shall be a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

A majority of both the Senate and House of Representatives voted in favor of HJR 11 and, in doing so, adopted the ballot title as contained therein. Article II, Section 1 of the Missouri Constitution states that “No persons, charged with the exercise of powers

properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.” See also *State Auditor v. Joint Committee on Legislative Research*, 956 S.w.2d 228, 231 (Mo. banc 1997). As a co-equal branch of government, the judgment of the members of the General Assembly regarding the fairness and sufficiency of the ballot language should be given a high degree of deference by this Court.

### **Plaintiffs’ Requested Remedy Is Not Authorized**

Plaintiffs ask This Court to only “invalidate” the election, rather than rewrite the summary statement and order a new election. If this court were to find the summary statement was such a significant irregularity to invalidate the election, this court’s only option is to correct the irregularity by rewriting the summary statement and calling a new election. Missouri Courts of Appeals have previously determined the courts have the authority to rewrite ballot titles. See *Seay v. Jones*, 439 S.W.3d 881 (Mo. App. W.D. 2014). Article XII, Section 2(b) requires that the **initial** election be at the next general election or at a special election thereto, but places no restriction on a court-ordered **new** election. In addition, Section 115.593, RSMo., dictates the procedure for calling another special election if, and only if, Plaintiffs are able to show election irregularities of a sufficient magnitude to cast doubt on the initial election. The remedy requested by Plaintiffs is not authorized by the Missouri Constitution or by state statute. Plaintiffs seek relief which is not authorized and therefore their claims must be denied.

Defendant Kander also appears to argue that Article XII, Section 2(b) renders Section 115.593, RSMo., unconstitutional. Defendant Kander is asking this Court to find that the procedure for a new election in Section 115.593, RSMo., as applied to constitutional amendments is unconstitutional (in contravention of Article XII, Section 2(b)). Plaintiffs are also asking This Court to sever the offending provisions in Section 115.593, RSMo., from the rest of the election contest procedures. Plaintiffs ask the court to simply “invalidate” the election.

If This Court were to find Section 115.593, RSMo. (relating to a “new election”) is unconstitutional because of Article XII, Section 2(b), then it must find the rest of the election contest provisions related to constitutional amendments unconstitutional as well. Section 115.593, RSMo., allowing this court to order a new election cannot be severed from the rest of the election contest provisions contained in House Bill 101 (1977). Section 1.140, RSMo., provides that statutory provisions cannot be severed when:

the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one.

In *State ex rel. Transport Manufacturing & Equipment Co. v. Bates*, 224 S.W.2d 996 (Mo. banc 1949), Plaintiffs sought determination of the constitutionality of a statute imposing a motor vehicle use tax. Respondents argued that even if the exemption was found invalid, it should be severed and the remainder of the act should stand. The court rejected this argument, stating:

If the invalid portion is so connected with the residue of the statute as to furnish the consideration for the enactment of the residue and as to warrant the belief that they were intended as a whole and that the Legislature would not have passed the part known the other part would be held invalid, then the entire act must fall.

*Id.* at 1002.

Here, the General Assembly would not have enacted procedures for election contests for legislatively referred constitutional amendments, without the provision that allowed for a new election. The General Assembly would not have provided for election contests for legislatively referred constitutional amendments if it meant that as a result of an election contest, voters would be completely disenfranchised, rather than be allowed another opportunity to decide a question that was appropriately before them. The General Assembly would not have provided for election contests on legislatively referred constitutional amendments, if it meant that the end result of an election contest would be the complete invalidation of the measure they wished to put before the voters, rather than simply a new election on such measure.

The statute allowing for a “new election” was essential to the election contest framework for legislatively referred measures that the General Assembly sought to establish through the enactment of House Bill 101. The rest of the provisions of House Bill 101 relating to election contests for constitutional amendments are dependent upon the option for the court to grant a new election, rather than simply disenfranchise voters.



The “new election” provision was a part of the inducement for the passage of the election contest framework itself.

Plaintiffs suggest the General Assembly can just “start over” in the next legislative session. This was not the intent of the election contest procedures of HB 101. Not only is the passage of another joint resolution not a guarantee, by a different General Assembly RSMo., but the next opportunity for the measure to go before the voters would not be for an additional two years. To suggest that this court interpret the provisions of Chapter 115, RSMo., in that manner is to suggest this Court write a new law, rather than construe the provisions as they were written.

As such, the provision for a new election for constitutional amendments cannot be severed from the provisions relating to election contests for constitutional amendments. If a new election cannot be ordered because Section 115.593, RSMo., contravenes Article XII, Section 2(b), then the entirety of the election contest framework for constitutional amendments falls, and Plaintiffs’ Petition fails to state a cause of action.

## **CONCLUSION**

This court should dismiss Plaintiffs’ claims on the grounds that they are out of time, moot, and barred by laches. Even if the court could get past Plaintiffs’ unreasonable delay in bringing their claims, this court should dismiss Plaintiffs’ Petition for failure to provide any shred of evidence necessary for an election contest claim. Finally, in the unlikely event this court would reach the merits of Plaintiffs claims, this

Court should deny Plaintiffs' Point I and find that the summary statement for Constitutional Amendment 1 was sufficient and fair.

WHEREFORE, Intervenors request that this court (a) declare that this Petition is out of time or that Plaintiffs' claims are moot; or (b) declare that Plaintiffs failed to meet their burden; or (c) declare that the summary statement for Constitutional Amendment No. 1 as adopted in TAFP CCS number 2 HJR 11 is sufficient and fair; and (d) order such other relief as necessary and proper.

Respectfully submitted,

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# **CERTIFICATE OF SERVICE AND COMPLIANCE**

The undersigned counsel certifies that on this 3<sup>rd</sup> day of February, 2015, a true and correct copy of the foregoing brief was served on the following by eService of the eFiling System and a Microsoft® Office Word 2010 version was e-mailed to:

The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

- (1) contains the information required by Rule 55.03;
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